IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

WALTER A. LAVENDER, Administrator de bonis non of the Estate of L. E. Haney, Deceased,
Petitioner,
vs.
J. M. KURN et al., Trustees of ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Debtor, and ILLINOIS CENTRAL RAILROAD COMPANY,
Respondents.

No. 550.

On Writ of Certiorari to the Supreme Court of Missouri.

SEPARATE BRIEF

Of Illinois Central Railroad Company
(a Respondent Herein).

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Cases Cited.

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STATEMENT AS TO NATURE OF THIS PROCEEDING.

The statement on pages 1 and 2 of petitioner's new brief filed herein after the granting of the writ by this court is admitted to be correct.

THE OPINION OF THE COURT BELOW.

The statement on page 2 of petitioner's new brief herein giving citation of the opinion of the Supreme Court of Missouri is correct.

JURISDICTION OF THIS COURT.

This court has jurisdiction to hear and determine this proceeding on the grounds alleged in said brief of petitioner on pages 2 and 3 thereof.

STATEMENT OF THE CASE.

While the history of the litigation—that is, as to the various proceedings, filing of pleadings, trial of case, appeal to Supreme Court of Missouri, decision by that Court, filing and overruling of motion for rehearing—is correctly set forth in the petition filed in this Court, this respondent is by no means satisfied with the statement of facts set forth in petitioner's petition for writ of certiorari or that found in his brief. On the contrary, as this respondent will show to the Court, there are glaring errors in said statements of facts, and for that reason the statements are exceedingly unfair, so that it is deemed necessary to make a full statement of the evidence.

The Evidence.

Haney's employment was that of a switch tender. It was a part of his duty to regulate certain overhead signal lights which were controlled from the shanty in which he had his office, and which governed the movements of certain trains.

On the evening in question, shortly before 7:30 o'clock, Haney set the lights from his shanty so that they would show red and stop north and south bound traffic in the Illinois Central terminal yards and would permit a Frisco interstate train from Birmingham, Ala., to Memphis, Tenn., to cross over the northbound and southbound Illinois Central tracks in the terminal yards, and then proceed westwardly until it passed a certain long switch. Haney then threw that switch (the switchstand where he threw the switch being entirely outside of the terminal yards), so that the Frisco passenger train could back over it eastwardly into the terminal yards and then northwardly into the Grand Central Station. It was Haney's duty to remain near the switchstand until the entire train passed completely over the switch point and passed the switchstand,

and then throw the switch back again and see to it that the light on the switchstand (which was then red) changed from red to green. While waiting for that train to pass, Haney's proper place was on the south side of the track. His next duty was to go back to his shanty, about 300 feet east, and change the overhead lights so that they would show green for northbound and southbound traffic in the yards (Rec. p. 93).

After the Frisco train backed eastwardly over the switch into the terminal yards all of the lights above referred to, including the one on the switchstand, remained red. Therefore, Bruso, foreman of one of the Illinois Central switching crews, whose engine had been stopped by the overhead red lights, went to the switchstand to investigate and found Haney lying, unconscious, north of the Frisco track and 14 feet farther west than the switchstand. No evidence shows just when he fell there. Bruso returned to the yard, sent a man to call for an ambulance, and took another switchman (Bundy) back with him to where Haney was lying unconscious (Rec. pp. 26-94). It was found that Haney had been struck on the back of the head apparently by some blunt instrument which crushed his skull at that point. He never regained consciousness, and was dead when the ambulance carrying him arrived at the hospital to which he was sent (Rec. pp. 65-254).

One of plaintiff's witnesses (Gates) testified (Rec. p. 24) that many transients, both black and white, were around the railroad yards in the neighborhood of the scene of the accident in question, both in the daytime and in the nighttime, seeking chances to steal rides on trains.

The switch track ran east and west near the place where Haney was found unconscious, and some feet south of his head. When Bruso and Bundy arrived, Haney was lying on the ground, face down; was a little farther north than the switchstand and a little west of it, his head pointed at a kind of angle **toward the south**, and his feet extended

northward at kind of an angle. **His head was about six feet north** (Rec. p. 26) of the switchstand and a little to the west of it. **Haney was 5 feet 7½ inches in height and his feet were about 10 feet north of the north rail of the switch track, extending straight back of him and not doubled under him,** so plaintiff's witness Bundy said (Rec. p. 27). There was a gash on the back of his head about two inches long, which was bleeding. **Bruso and Bundy turned Haney over** and then discovered his pistol loosely in his hand and his lantern under him. The switch had not been closed after the Frisco train had backed over it and gone to the station, and the red light on the switchstand was still showing (Rec. p. 27).

Bruso and Bundy turned Haney around and raised his head, and Bundy squatted down, took Haney's head on his lap and held it until the ambulance driver came to take him to the hospital (Rec. p. 28). There was no evidence of any injury other than the one to the back of Haney's head, except scratches on the right side of Haney's face where it had struck the cinders (Rec. pp. 93, 67, 254). His watch and his diamond ring were found on him, **but his pocketbook with his money in it was missing.** The pocketbook was found a week later about two blocks from the scene of the accident at a point where it had been sheltered from the weather (Rec. p. 118). It was identified by papers in it bearing Haney's name. Haney's money had been taken from it.

Plaintiff had, long before the trial, taken the deposition of John Joseph Drashman, who was coach foreman for the Frisco Railroad, having charge of supervising repairs and anything connected with passenger cars. Drashman, being present at the trial, was called by plaintiff as a witness. He testified that he was on duty on the evening of December 21, 1939, at the Grand Central Station, a little more than half a mile north and east of the scene of the accident. Having been informed about 7:40 P. M. that an

accident had occurred down near the switch in question, Drashman went with the superintendent of the Frisco Terminals, Mr. Ora L. Young, on foot down to the place where Haney had been found unconscious.

Drashman became very much confused at the trial as to what he had testified to in his deposition. In his deposition he had testified that he made two trips to the scene of the accident, and that on the first trip he found Haney still on the ground, unconscious; that he returned to the station, made an inspection of both sides of the train, found nothing swinging out from it or extending out from it (Rec. pp. 62-64), and then came back, and by that time Haney had been sent to the hospital. At the trial Drashman positively denied that he made more than one trip to the scene of the accident and said that Haney had been removed before he got there, and, therefore, he did not see Haney at all, but he gave the same testimony as to inspection of the train as he had given in his deposition. All that was said by either Drashman or Gates in their depositions as to the position of Haney when they arrived throws no light on the position in which he was first found, because, as above stated, Bruso and Bundy turned him over and turned him around before anybody but them arrived, as both Bruso and Bundy testified.

Both in his deposition and at the trial Drashman was permitted to testify, over strenuous objections by all of the defendants, through their counsel, that while he was investigating at the scene of the accident, some unknown person, whom he took to be an I. C. railroad switchman, stated in his hearing in a group of men who had gathered there that he thought that something sticking out from the side of the train had struck Haney and injured him. Both in his deposition and at the trial Drashman said that he did not know who that man who made the statement was, but that said man did not claim to have been present or to have seen the accident happen (Rec. p. 62).

These statements of Drashman, as to what was said by an unknown man at the scene of accident, were objected to as hearsay, but were admitted by the court on the theory that they constituted a part of the res gestae.

The baggage cars and the mail car had sliding doors which are on the inside about six inches from the outside of the cars, and the Pullmans and day coaches all had vestibule doors which opened toward the inside of the cars. There were, of course, no freight cars in that high class passenger train (Drashman's testimony, Rec. p. 58).

There was a railroad track used by two other railroads than the Frisco, about 25 feet north of the Frisco switch. About midway between those two tracks was an accumulation of cinders and dirt about 18 inches to two feet in height and running a considerable distance east and west, which resulted from the accumulation of sweepings from the two tracks. Defendants' Exhibit B (Rec. p. 102B) clearly shows that this higher ground was farther from the rail than the first white pencil which was 5 feet 9 inches from the rail (Rec. p. 110).

The hospital record of St. Joseph's Hospital in Memphis was offered in evidence and showed that Haney was dead when he arrived at the hospital. In the history of the case contained in the hospital record it was stated that there was an abrasion to the right posterior part of the head approximately five centimeters long and one centimeter wide with depression of the skull under the abrasion involving occipital and parietal regions, and that cinders were ground into the skin **on the right side of the face** (Rec. p. 67).

The report of the autopsy showed no injuries other than those above mentioned (Rec. p. 67). It was recited that there was a traumatic fracture of the skull with associated meningeal hemorrhage.

The physician who examined Haney to ascertain whether

he was dead or alive when he arrived at the hospital (Dr. W. E. Turner, Jr.), testified for plaintiff that he was the one who had made the record and he was present when the autopsy was performed. He testified; "Our conclusion was that the skull was fractured by some fast moving small, round object. I guess it would be possible for that small round, fast moving object to have been a rod or something projecting out from a train that was going 8 or 10 miles an hour. I don't know anything about it, but I think it could be. Maybe an iron pipe." He said in cross examination: "It is very possible, in my opinion and judgment, that this man could have suffered a blow by some, maybe, gas pipe or club or other similar round object also in the hands of some individual" (Rec. p. 66).

C. Bruce Farmer, a railway postal clerk who had been employed by the United States Government on railway postal cars for many years, was called by plaintiff as an expert witness to show the structure of mail catcher arms on the sides of mail cars (Rec. pp. 82-87).

He testified that such cars vary from 30 to 60 or 70 feet in length. He identified Defendants' Exhibits C and D (Rec., pp. 102C-102D) as correct photographs showing such a mail catcher arm, Exhibit C showing it down at the side of the car while not in use, and Exhibit D showing it when raised in such position that it can catch a mail pouch above a station platform. He testified that he had measured several such mail cars and the space between the level of the ties of a track on which the cars stood and the bottom of the mail catcher arm when not in use. He found that on the Frisco mail car which he measured the distance was 80 inches from the level of the ties to the lower end of the mail catcher arm when down, and when the same arm was swung out into position to catch a mail pouch, it was 87 inches from the top of the ties to the mail catcher arm (Rec. p. 83).

In all his experience he had never known such a mail catcher arm, when hanging out from the side of the car, to swing out more than one foot from the side of the car (Rec. p. 83), and it did that only in the event that the train was being very rapidly run or was going around a curve. When the door was open, and only when it was open, a mail clerk inside the car could catch hold of the lever above the cross-piece of the catcher arm and pull it inward and downward and cause the mail catcher arm to swing up into position to catch a mail pouch, and it would then be about 9 feet above the top of ties, and extend out about 30 inches from the side of the car (Rec. p. 83).

Haney's son testified that on the morning following the accident he saw a spot of blood (at least he took it to be blood) on the cinders about six or eight feet east of the switch stand in question and three or four feet north of the rail and that the ground north of that point for some distance east and west was rough and uneven (Rec. p. 80).

Evidence as to Employer of Haney.

In an effort to prove that Haney was an employee of the Illinois Central Railroad Company, plaintiff's counsel, while the widow of Haney was on the witness stand, offered in evidence the pay checks for Haney's wages, which checks were twelve in number, covering periods of two weeks each from July 15, 1939, through the second period of December, 1939, the last check being dated December 30, 1939 (Rec. p. 75).

All of those checks were payable to L. E. Haney, and all but the two for two periods in December, 1939, bore Haney's endorsement, which was identified by the widow, who testified that he got the money represented by all of those checks except the one dated December 15, 1939, and the one dated December 30, 1939, which last two mentioned checks were paid to her after Haney's death, by a special

arrangement which she made with the Yazoo and Mississippi Valley Railroad, whereby she was permitted to endorse and collect them (Rec. p. 78).

Except as to the date, the periods covered and the amounts, the checks were exactly alike. A photostatic copy of a specimen of the checks will be found on page 90A of the record. It will be seen that at the top of the check are the words, "The Yazoo & Mississippi Valley Railroad Company." In the lower left-hand corner are the words "To Treasurer, The Yazoo & Mississippi Valley Railroad Company" and the names of three banks, one in Chicago, one in St. Louis and one in Memphis, are given as banks through which the checks are payable.

An emblem of the **Illinois Central System** is found in the upper left-hand corner with the words "Illinois Central" printed across the emblem. At the bottom of the check is printed a similar emblem with the same words, and at the right of those words is the name "G. C. Lyon," both the last mentioned emblem and the name being under the word "Countersigned." In the right lower corner are the words "R. E. Connelly, Treasurer." On the back of each of the checks except the last two is the signature "L. E. Haney," which Mrs. Haney identified. On the last two checks dated December 15, 1939, and December 30, 1939, respectively (one of which is reproduced by photostatic copy on page 90A of the record), the following endorsement appears: "Pay to the Order of Mrs. L. E. Haney, Account deceased. The Yazoo & Mississippi Valley Railroad Company, A. B. Huttig, Assistant Treasurer, Countersigned G. C. Lyon." Then appears the endorsement, "Mrs. L. E. Haney."

Mrs. Haney further testified: My husband had a little button that he wore.

Q. What did the button say on it? A. I think it was the lodge he belonged to.

Q. Did it show any name or anything? A. I thought it had YMV on it.

On the same subject, Haney's son, Alvin Arthur Haney (Rec. p. 80) testified that he worked with his father during the Christmas season before his death. He said: "As far as I know, I thought I was working for the I. C. Railroad. I say that because I was hired in the Grand Central Station, the Illinois Central Station, and that was where I was paid by checks. I say I worked for the same railroad my father worked for because he got me the job and it was right down there with him. I got paid, as far as I remember, the same place he got paid. We got our checks in the Grand Central Station. I don't know whose office it was we went into. I didn't pay any attention to any signs on the office.

I saw my father wearing a button, an insignia of some kind, while I was there. As far as I remember, I thought it had 'Illinois Central' across the top of it, 'Railroad Brothers Trainmen' or something. He wore that on his cap while he was working."

On the same subject the daughter, Mrs. Marjorie Haney Linsom, testified: "I have seen my father wear a button when he worked. It was a round button and it has 'Illinois Central' or 'I. C. Railroad' on it. It was just the initials 'ICRR.' He wore the button on his cap. He had a railroad pass and on that was 'The Illinois Central.' He had had it for several years, he had it for my mother and my brother and myself. I rode on it a number of times. It was renewed from time to time * * *. My mother or I could ride on that pass. We rode on it on the Illinois Central, and when we went on any other road we got a foreign pass, they call it. We could not ride on the Illinois Central pass on another road. The pass was made out to Lyman E. Haney, employee. All I can remember that was on it was that it had 'Illinois Central' on it and it was issued to

L. E. Haney, Employee. * * *. I believe the pass that I speak of had the name 'Illinois Central System' on it. I didn't see that it had Y&MV on it also. I never saw the button that my father wore on his coat or vest. The one on his cap had 'Brotherhood of Trainmen' on it. It did not have 'IC System' on it. It did not have Y&MMV on it. It had 'ICRR Brotherhood of Trainmen.'"

There was no evidence offered tending to show that the place where Haney was killed was inside of the terminal yards covered by the contract above mentioned or that said place was in anywise owned or controlled by the defendant Illinois Central Railroad Company.

It was admitted that the passenger train for which Haney had thrown the switch very shortly before he was killed was operated by the Trustee of the Frisco, who had been regularly and duly appointed, and that said train was an interstate train, operating between Birmingham, Ala., and Kansas City, Mo., through Memphis, Tenn., and that, therefore, both Haney (in throwing the switch) and said defendant trustees were engaged in interstate commerce; and it was also admitted that the Illinois Central Railroad Company was engaged in operating trains through various states at said time.

Defendants' Evidence.

On the part of the defendants the evidence tended to show the following facts:

When Bruso, I. C. switching foreman, went to the scene of the accident, as above stated, to learn why the switch light was not changed, he found Haney (Rec. p. 93) **14 feet west of the switch stand and his head was lying five feet nine inches from the north rail** of the track and **his feet were straight back of him 13 or 14** feet away from **said north rail. There were two marks on the little mound of dirt and cinders which indicated that as he fell forward**

Haney's feet dragged down the south side of the mound, and those marks were plainly visible the morning following his death. His drawn pistol and his lantern were under him. Bruso and Bundy, whom Bruso had promptly summoned to help him, turned Haney over and **turned him around so that he was lying either on the mound or on the edge of it with the length of his body approximately east and west, and Bundy raised Haney's head,** as already mentioned in an earlier part of this statement (Rec. p. 94).

Bruso then went to the shanty where Haney had his headquarters, broke the glass in the locked door (Rec. p. 94) and reached in and changed the overhead lights so that north and south bound traffic could proceed, and then he went on in the discharge of his ordinary duties.

About eight o'clock that evening Ora L. Young (a witness called by defendants), the Superintendent of Terminals for the Frisco in the Central station, went with Drashman to the scene of the accident. Only one trip was made down there. As they were on their way down there Mr. Young looked the train over on both sides and found nothing whatever out of order, no open doors, nothing swinging or projecting from the train, and nothing at all unusual on either side of the train.

On returning from the scene of the accident Mr. Young carefully inspected two cars which had been left in Memphis by Frisco train No. 106, a baggage car and the mail car (Rec. p. 106). He made a particular examination of the mail car at that time and testified fully as to the condition of the mail catcher arm which he had not been able to inspect before, because there were men working inside of that car whom he did not want to disturb. Everything about the mail catcher arm was in its usual condition (Rec. pp. 105-106).

On the morning following the accident Bruso accompanied two city police officers and a special agent of the

Frisco Railroad to the scene of the accident and pointed out to the police officers the place where Bruso had found Haney lying. A white pencil was placed at the point where the spot of blood coming from his head had been found and another pencil at the point where his feet were found. A photographer was present and he took two photographs of the scene, which were reproduced in the records as Exhibits A and B, respectively, and will be found on pages 102A-102B, respectively. The two white pencils show very plainly in Exhibit B.

As to the employment of Haney, the evidence on the part of the defendant Illinois Central Railroad Company showed very clearly that Haney was employed exclusively by the Yazoo & Mississippi Valley Railroad Company and was carried on the payroll of that company for many years. His superior, the trainmaster, Mr. Burns, who had been employed exclusively by that railroad for many years, testified that he knew Haney and knew that he was employed by that railroad alone (Rec. p. 132).

The evidence showed there are three railroads embraced in the system known as "Illinois Central System," to-wit: Illinois Central Railroad Company, which operates a line of railroad from Chicago, Illinois, to Memphis and points farther south; Yazoo & Mississippi Valley Railroad Company, which is a separate railroad corporation and operates a system of railroads in and about Memphis and other points in the South, and the Gulf & Ship Island Railroad, which operates a railroad in the southern portion of our country.

The Yazoo & Mississippi Valley Railroad Company, at regular intervals, billed the Illinois Central Railroad Company for two-twelfths of Haney's wages, representing the time he was employed in throwing switches and setting signal light for the Frisco Railroad trains (Rec. p. 112); the Illinois Central Railroad Company paid those bills and in turn collected said two-twelfths of Haney's wages from

the Frisco Trustees, pursuant to the terms of the contract above mentioned (Rec. p. 112).

The button worn on Haney's cap was a button such as the Brotherhood of Railroad Trainmen furnished to all its members every month, regardless of the railroad by which they were employed. The buttons were used as evidence to other men to show that their dues were paid up to date. **No such button ever bore the name or the initials of any railroad company.** A sample of such button is reproduced by photostat on page 110A of the record. The wording on it is "100% for my country and brotherhood," which legend begins near the rim of the button on the left side and runs over the top to the right side. At the bottom of the button is "Feb. 1943." In the center of it is a capital letter "T," which stands for trainmen, and that letter is in the center of a representation of the spokes of a wheel.

By the Frisco engineer, Mee, who was in charge of the engine on that same train, it was shown (Rec. pp. 125-127) that as the train moved backward towards the station onto the switch he was looking towards the rear of the train in an easterly direction and could see along the side of the train a considerable distance. He saw nothing projecting or swinging from the mail car or any other part of the train, and did not see Haney or any other person on the north side of that switch as the train passed over it.

It was also shown by Mee (Rec. p. 130) that rule 104 of the standard rules for train operations requires a switch tender under such circumstances as existed at said time and place, after throwing the switch to cross to the opposite side of the track and wait until the train passes.

Similar testimony was given by the witness Bruso when he was recalled to the stand after having given a part of his testimony (Rec. p. 131).

We repeat, there was not a particle of evidence anywhere in the entire record showing or tending to show that this respondent owned or controlled the track on

which the Frisco train was being operated on the night of Haney's death, or that it owned or controlled in any way the ground on which such track was located, or the ground on either side thereof. On the contrary, the undisputed evidence clearly showed that said track was laid in a **public street of the City of Memphis, Tennessee** (Rec. p. 107).

Counsel for this respondent pointed out in their original brief filed herein on pages 15 to 22, inclusive, a number of erroneous statements contained in the petition for the writ and in the brief of petitioner in support thereof. Some of those erroneous statements have been omitted from the new brief filed by petitioner, and such of those as are repeated in that brief will be pointed out here now.

On page 7 of Petitioner's new brief is the statement that Haney was found "about five feet north of the north rail of the track over which the train had passed **with his head pointing in the general direction in which the train had just backed in.**" This statement is exactly contrary to the testimony of plaintiff's own witness, Bundy, and to that of respondent's witness Brusso, as previously pointed out in this statement, Bundy's description of the position of Haney's form being found on pages 26 and 175, and Brusso's on page 93 of the record.

Near the bottom of page 7 of said brief is the erroneous statement, "the evidence showed that when this mail car swayed or moved around a curve, the mail hooks would pivot and swing out from the side of the car from 12 inches to 3 feet." The evidence of plaintiff's expert witness Farmer, the mail clerk (record pages 82-84), was to the effect that **under no circumstances could the mail catcher arm, which plaintiff called the mail hook, swing out more than 12 inches from the side of the car**, and then only if the train was moving rapidly around a curve or over a rough track. The only way the mail catcher arm could be made to extend out as much as three feet, or anything

like that much, would be when the door of the mail car was open, and the handle was pulled inward and downward from the inside of the car. Drashman's testimony was to the same effect (record page 64). There was no evidence that the door was open, that anybody pulled a lever down, or that there was any occasion to do so. At the bottom of said page 7 is the statement that the train was moving around a bad curve at the time Haney was killed. The evidence does not show when Haney was killed, whether it was while the train was backing past him or after it had completely cleared the switch point. The evidence further shows (see plat, record page 88) that the switch point was right at the beginning of the curve, and a mark placed on the plat west of the switch point, which was at a distance of 14 feet therefrom, shows that the track was straight at that point. Therefore, while most of the train had gotten upon the curve on the switch track, whatever part of the train passed the point where Haney was found unconscious passed that point on a straight track.

Near the top of page 8 of said brief is the statement, "the mail hook could, therefore have struck Haney in the back of the head." That statement is incorrect, for if Haney was standing on the level ground between the switch track and the gravel and cinders, the lower end of the mail catcher arm, even when against the side of the car, was 12½ inches above his head, and if raised, it was at a height of nine feet, which was far above his head; while if Haney was standing on the elevation of the gravel and cinders, he was at least 10 feet from the track and therefore clear out of reach of the mail catcher arm when extended as far as possible.

On said page 8 petitioner quotes what Haney's son, Alvin Haney, said as to the position of a spot which he saw on the morning following Haney's death and which he **believed** to be a blood spot. In the first place, Alvin Haney

testified that the blood spot was **east** of the switch stand, and that the ground was **rough at that place**. There is no substantial evidence, but only an inference which might be drawn from young Haney's guess, that his father was found at that place. He did not see his father at all, before he got to the hospital, and the pictures, as above pointed out, show that the ground at the place approximately 14 feet west of the switch stand, where Haney was actually found by Bundy and Brusso, was level for a distance of about 10 feet north of the track.

In the next to the last paragraph on said page 8 is the statement that Haney's pistol had slipped out of his pocket and was found under his body, when he was turned over. This is based purely on the surmise of witness Bundy, under leading questions by petitioner's counsel. Bundy **supposed** that was what had happened. But Mrs. Haney, who testified for respondent (R. 78), testified that her husband carried his pistol in a scabbard. It is a matter of common knowledge that policemen carry their pistols in holsters and have to release a flap before a pistol can be drawn.

Again, in the same paragraph, petitioner's counsel state their **conclusion** that the mail hook struck Haney. We differ with them in that conclusion, and no evidence sustains their conclusion.

On page 9 of said brief, in the middle of said page, three questions and answers are quoted from page 175 of the new record. Petitioner gives the paging of the old record. His quotation makes Bundy say that Haney's head was pointing **southwest**. That is evidently a misprint. We have already quoted from Bundy's testimony on page 26 of the record and if the court will turn to page 175 thereof from which petitioner quotes the three questions and answers above mentioned, it will be found by reading all of that portion of Bundy's testimony that it is correctly summarized on page 26 of the record, and shows that

Haney's head was 5½ feet north of the track and his feet extending straight back from him towards the north were ten feet from the track. He was, therefore, not lying parallel to the track or with his head pointing in the direction towards which the train was backing (R. 27, 28, 93, 94, 95).

On said page 9 it is stated that Drashman testified that Haney's body was lying parallel to the track. His own testimony showed that he was so confused on the subject that he did not know what he was talking about. The testimony of plaintiff's own witness Bundy, as well as that of respondents' witness Brusso, showed clearly that they had lifted Haney and turned him around, completely changing his position before Bundy or anybody else arrived on the scene (R. 28, 94).

On page 10 of said brief, in the last paragraph thereof, it is stated that the evidence showed that the Illinois Central Railroad Company furnished Haney with a dangerous place to work because of the presence of the high ground and because there was no artificial light at that place. The evidence does not bear out that statement, for there is no evidence anywhere in the case tending to show that the Illinois Central Railroad Company had any control of said place, and the only evidence on the subject—that of Mr. Young—showed that it was in a public street belonging to the City of Memphis (R. 107).

In various places in said brief it is stated that the Supreme Court of Missouri held that the mail hook could have struck Haney, but did not do so. No such statement is to be found anywhere in the Court's opinion, which is not only found in the printed record, but is attached as an appendix to the brief of counsel for the Frisco Trustees.

SUMMARY OF ARGUMENT.

1.

The Supreme Court of Missouri properly reversed the judgment of the trial court because the latter court had erred in overruling this respondent's demurrer to the evidence at the close of all the evidence in the case, for the following reasons:

(a) The hearsay statements of an unknown man in the group gathered at the scene of the accident some time after it occurred, which the trial court permitted a witness for plaintiff to repeat, did not meet the requirements of the rule relating to admitting statements as part of the res gestae, because, admittedly, the man who made it was not present when the accident occurred and on its face it purports to be only a **guess** about how the accident **might** have happened. There was no other evidence to show how Haney was injured.

The evidence offered by plaintiff conclusively showed that nothing sticking out of the train or swinging from it struck Haney.

Hence, the demurrer to the evidence should have been sustained.

(b) Even if it could be said that plaintiff's evidence tended to show that some object protruding from or swinging from the train might have struck Haney (an impossible assumption, as he was at least a foot shorter than the height of the mail arm above the ground), this incredible assumption is far less probable than the one that Haney was assaulted and robbed. The Supreme Court of Missouri was right in holding there was no substantial evidence to prove how the accident occurred. On pages 102-A, 102-B of the record are photographs, marked, re-

spectively, defendant's Exhibit A and defendant's Exhibit B. Both of them show the higher ground consisting of cinders and gravel on which it is claimed Haney was standing when struck by something. But it is shown without dispute in the evidence that the edge of this higher ground or cinders was at least ten feet from the rail (defendant's Exhibit B, record page 102-B), much too far away for him to have been struck by the mail arm which, when extended, reached but 36 inches from the car (Rec. p. 83). When out this far it is nine feet above the rail (Rec. p. 83). Those photographs show that the ground was perfectly level between the switch track and the higher ground, consisting of cinders and gravel, a distance of ten feet. (Defendant's Exhibit B, Rec. p. 102-B.) The evidence of plaintiff's witness, Farmer, shows that if Haney was standing on level ground of the same height as the ties (as the evidence shows the ground was) it would have been physically impossible for the mail catcher arm to strike him because, even when at rest, the lower end of it was 80 inches above the ties, while plaintiff's witness, who was the son of Haney, testified his father was 5 feet 7½ inches tall, which would be 67½ inches, or 12½ inches lower than the lower end of the mail catcher arm. The evidence showed that the higher ground of cinders and gravel was so far from the track that if Haney was standing upon it the mail catcher arm could not under any circumstances reach out far enough to touch him (Rec. p. 83). The photograph Exhibit B showing the switchstand demonstrates clearly that the ground in the space between the Frisco track and the pile of cinders and gravel was on the same level with the ties.

The demurrer to the evidence should therefore have been sustained.

(c) Even if the evidence had shown that Haney's death resulted from being struck by an object projecting or

swinging from the Frisco train, the accident would have been so unusual that it could not reasonably have been foreseen by a reasonably prudent person in this respondent's situation in the exercise of ordinary care, and, for such an accident, a defendant is not liable. Hence, this respondent's demurrer should have been sustained.

(d) A master cannot be held liable for an injury to a servant which results from a defect in an appliance or in a working place furnished the servant, unless it is shown that the master had either actual knowledge or constructive notice of such defect.

Neither actual nor constructive notice of an object projecting or swinging from the Frisco train was brought home to the appellant, Illinois Central Railroad Company, and hence respondent's case against it falls to the ground, even if Haney was an employee of the Illinois Central Railroad Company, which the evidence disproves.

(e) There must be a duty owed and a breach thereof before there can be negligence. The duty to keep the streets on which the Frisco track was laid properly illuminated, and free from obstructions, such as piles of gravel and cinders, rested upon the City of Memphis, not upon this respondent, for it had no control of the street and no duty or right to light it or remove cinders or gravel from it, and hence this appellant could not be held guilty of a breach of such duty. That made it mandatory to sustain the demurrer to the evidence.

(f) The presence of the cinders and gravel was not a proximate cause of Haney's death. He could have stood upon the gravel and cinders safely all night if a separate intervening cause had not produced his injury and death. The proximate cause is what the law regards; and a causal connection between an alleged negligent con-

dition or act and injury or death must be shown or there can be no recovery on that account.

(g) The plaintiff sued the wrong railroad as Haney's employer. The suit was erroneously brought against Illinois Central Railroad Company. Documentary evidence identified by plaintiff's witness, Haney's widow, as well as overwhelming and uncontradicted oral testimony offered by this appellant, showed conclusively that Haney's employer was not Illinois Central Railroad Company, but the Yazoo & Mississippi Valley Railroad Company (a separate and distinct corporation operating its own line of railroad) which was not made a party to this suit.

One who was not an employee of a defendant at the time of injury cannot recover damages of such defendant for such injury, nor can his personal representative maintain a suit under the Federal Employers' Liability Act for damages for his death.

For that reason the demurrer to the evidence should have been sustained.

ARGUMENT.

I.

The demurrer to the evidence at the close of the case should have been sustained and the Supreme Court of Missouri was right in so holding because:

(a) No admissible evidence whatever tended to show that Haney was killed by an object protruding from or swinging from the Frisco train. Plaintiff himself disproved his allegation to that effect.

The hearsay testimony as to a declaration by an unknown person in a crowd some time after Haney had been injured was admitted on the theory that such declaration constituted a part of the res gestae. Not only was this statement made by a person who was not present at the time of the accident, but it is a recital of what someone else said, and admittedly is a guess about how the accident might have happened. It does not purport to be a statement of fact (Rec. pp. 40-62). The witness was permitted to testify that someone else, unknown to him, who said he did not see the accident, "thought" or "supposed" something "might" have been sticking out from the side of a car. This hearsay evidence, twice removed from testimony which might be dignified as legal proof, is the sole basis for submitting the case to a jury. Aside from that statement, the record is entirely bare of any suggestion of an object protruding or swinging from a car.

RES GESTAE.

Bouvier's Law Dictionary defines the term "res gestae" thus: "Transaction; thing done; subject matter."

Webster's New International Dictionary (2 Ed.) defines it thus: "The facts which form the environment of a liti-

gated issue; the things or matters accompanying and incident to a transaction or event."

The Century Dictionary defines it thus: "Things done; material facts."

In order, therefore, for anything to be **a part of the res gestae** it must be a **part of the transaction or thing done or subject matter**; or a **part of the facts which form the environment of a litigated issue** or **of the things or matters accompanying and incident to a transaction or event**; or **a part of the things done or material facts.**

We find the following in Wigmore on Evidence, 3rd Ed., Section 1751:

> "* * * **The declarant must appear to have an opportunity to observe personally the matter of which he speaks.** This requirement is in practice usually fulfilled in the case of all declarations otherwise admissible; for they are made by injured or others present and concern the circumstances of the injury as observed by them; and thus no occasion arises for calling attention to the requirement. Nevertheless, in an appropriate case, it would without doubt be enforced; for example, if a passenger in a railroad collision should exclaim 'the engineer did not reverse the lever' or 'the conductor did not read the train dispatcher's orders.'" (Emphasis ours.)

It is unnecessary to burden the court with a lengthy discussion of all the decisions, but we respectfully submit that, under the rule which is well established by such decisions and by eminent text-writers, the statements by the witness Drashman, called by the plaintiff in this case, to the effect that **some** man, who was **unknown** to him, standing in a little group of men which the witness reached after walking half a mile or more, following his learning of the accident, to the effect either that he **thought** something sticking out of the train struck Mr. Haney, or that

something sticking out of the train struck him, or was supposed to have struck him, were clearly inadmissible.

Wigmore on Evidence, 3rd Ed., Sec. 1751;
Barker v. St. L., I. M. & S. Ry. Co., 126 Mo. 143;
Redmon v. Met. Str. Ry. Co., 185 Mo. 1;
Ruschenberg v. So. Elec. Ry. Co., 161 Mo. 70;
Bankers' Life Ins. Co. v. Reynolds, 277 Mo. 14, l. c. 22-24;
Landau v. Travelers Ins. Co., 276 S. W. 376;
4 Chamberlayne on Ev., 2893;
3 Wigmore on Evidence, 2nd Ed., Sec. 1747;
Woods v. So. Ry. Co., 77 S. W. (2d) 374;
22 C. J. 462, Sec. 550;
Sconce v. Jones, 121 S. W. (2d) 777;
Johnson v. So. Ry., 175 S. W. (2d) 802;
32 C. J. S., Sec. 410, p. 24;
Hartford Fire Ins. Co. v. Kiser, 64 Fed. (2d) 288;
Vicksburg & Meridian R. Co. v. O'Brien, 119 U. S. 99;
Beck v. Dye, 92 Pac. (2d) 1113 (Wash.);
Schuman v. Bader & Co., 227 Ill. App. 28;
Hines v. Patterson, 225 S. W. 642 (Ark.);
Tex. Int. Ry. Co. v. Hughes, 53 S. W. (2d) 448 (Tex.).

Plaintiff's counsel convinced the trial court that such hearsay statements by an unknown person, **who did not even claim to have been present when the accident occurred or to have seen it** (Rec. p. 52), were admissible as part of the res gestae.

Such statements were not admissible as part of the res gestae, because there was no evidence tending to show that the unknown man in the group was present when the accident occurred, and, in fact, the plaintiff's witness, Drashman, from whom such statements were elicited at the trial expressly stated that **the man who made the statements did not claim to have been there when the accident happened or to have seen it** (Rec. p. 52). It was

essential to show that he was present. That burden was on plaintiff.

The rule is that in order for such statements to be admissible they must have been made **contemporaneously with the happening of the accident or at a time so closely connected therewith that the witness had no time to reflect so as to make up a story that was not true**; or, if the person making such statement had been rendered unconscious in the accident, then no matter how long he was unconscious, if he made the statement so promptly after regaining consciousness that it was spontaneous and without time to manufacture an untruth, the statement may be considered a part of the res gestae, provided, further, that the witness is shown to have personal knowledge of the facts concerning which he speaks.

Under the authorities the quoted statements could not be properly admitted, since the man who is alleged to have made them was not rendered unconscious, was not suffering from the effects of any violence (since he was not the one who was hurt), was not shown to have any personal knowledge on the subject of which he spoke, and at most was relating nothing more than the surmise of an unknown person who did not even see the accident!

In Chamberlayne on Evidence, Vol. IV, 2893, the the following statement is found:

> "To judicial administration, the automatic is the true. What a declarant asserts, not so much of himself as overborne and forced thereto by overwhelming emotion, the stress of sudden shock or intense pain, the law of evidence assumes to be the fact. That which judicial administration, nervous, as it were, at being deprived of the test of cross-examination, the greatest guaranty for the discovery of truth which the English jurisprudence has as yet been able to devise, fears in connection with such statements is reflection, the opportunity for adjusting facts to self-interest, con-

sciously or unconsciously shielding the true and false, coloring, distorting and preventing that which is real. In an instinctive automatic utterance, where the declarant speaks from his subjective or soul-mind rather than from the promptings of that which is habit, really conscious, this element of reflection is largely, if not wholly, absent. The speaker is not so much voluntarily declaring himself as instinctively reacting to an outside stimulus. More physically considered, it would rather seem that the transaction is speaking through the declarant than that the latter is consciously talking about the transactions."

Professor Wigmore, in III Wigmore on Evidence, 2 Ed., Sec. 1747, says:

"This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control; so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts."

The admissibility of a statement or an exclamation of a bystander is discussed in 32 C. J. S., Section 410, p. 24, as follows:

"In order for a declaration or statement to be admissible as part of the res gestae, it must appear that it was made **by one who either participated in the**

something sticking out of the train or swinging from it inflicted the blow which caused Haney's death (and not only is it not equally probable but it is not even possible) as that some unknown assailant struck him from behind, one state of facts being no more clearly shown than the other (the most plaintiff can claim) plaintiff's case would necessarily fail because it cannot rest on mere conjecture and surmise.

Hamilton v. St. L. & S. F. Ry. Co., 300 S. W. 787;
Bates v. Brown Shoe Co., 116 S. W. (2d) 31;
Pape v. Aetna Cas. Co., 150 S. W. (2d) 669;
Lappin v. Prebe, 131 S. W. (2d) 511;
Penn. R. R. Co. v. Chamberlain, 53 Sup. Ct. Rep. 391;
N. Y. C. R. R. Co. v. Ambrose, 50 Sup. Ct. Rep. 198;
C. M. & St. P. R. Co. v. Coogan, 271 U. S. 472;
Patton v. Tex. & Pac. Ry. Co., 179 U. S. 658;
C. & O. Ry. Co. v. Stalpeton, 299 U. S. 587, 53 Sup. Ct. Rep. 591;
A. T. & S. F. Ry. Co. v. Toops, 281 U. S. 351, 50 S. C. 281;
A. T. & S. F. Ry. Co. v. Saxon, 284 U. S. 458, 52 S. C. 229;
Gunning v. Cooley, 281 U. S. 90-94, 50 Sup. Ct. 231.

But the plaintiff went further and completely obliterated every chance of recovery on presumptions or circumstantial evidence by showing by Drashman, a witness whom plaintiff's counsel placed upon the stand, that said witness, after learning of the accident, inspected the Frisco train over its full length on both sides and that nothing whatever was found protruding from the train or loose on the side of the train so that it could have swung out as it passed the decedent (Rec. p. 57). This was corroborated by defendant's witness, Young (R. pp. 104-105).

Discovering, no doubt, that he had completely ruined his case by the testimony of the witness whom he had put on the stand, plaintiff's counsel attempted to establish

the theory that the mail catcher arm which was fastened on the side of the mail car swung out from its position and struck Haney as it passed.

But that effort also ended in a dismal failure, for the railway mail clerk, Farmer, whom plaintiff called as a witness and who was a man of experience, from which he had learned all about railway mail cars, how they are equipped and the position and action of such mail catcher arms, gave testimony which showed conclusively that, under no circumstances whatever, could the mail catcher arm have swung out more than one foot from the side of the car; that the lowest part of it was **eighty inches (6 feet 8 inches)** above the ground (which would have been **more than a foot above Haney's head if he were on the level ground and more** than a foot above his head if he had been standing on the higher ground farther away), because in that case, assuming that the mail catch arm which, **when raised,** extended but 36 inches from the car, would be nine feet above the bottom of the rails [R. 83]. The higher ground, consisting of gravel and cinders, was but 18 to 20 inches above the rail [R. 57], so Haney, 5 feet 7½ inches tall [67½ inches], would have been below the mail arm if standing there. Furthermore, as has been shown, the high ground was far beyond the reach of the arm in any position [Defts. "Ex. B," R. 102A; see, also, 102B], and that the only way the arm could be made to operate was by opening the door of the mail car and using a lever on the inside of the door of the car for that purpose. There was no occasion to raise it, for there was no railroad platform anywhere near the scene of the accident and consequently nothing on which a mail sack could be hung so that it might be taken off by means of the mail catcher arm.

There was not even a scintilla of evidence tending to show that anything protruding from the side of the train

transaction or witnessed the act or fact concerning which the declaration or statement was made. As this rule implies, it is not necessary, in order to render a statement or act admissible as part of the res gestae, that it should have been made or done by one of the participants in the main transaction, but if it has the necessary connection with the main fact, it may be admissible no matter by whom it was made or done, **provided, in the case of a declaration, it relates to a matter of fact to which declarant might testify if called as a witness.** Accordingly, the exclamations or declarations of a mere bystander may be admissible as part of the res gestae, although there are numerous cases in which such declarations have been excluded." (Emphasis ours.)

Applying the rules and tests announced by the foregoing authorities, it seems too plain to require argument that evidence of the statements made by the unknown man who "looked like an I. C. switchman," according to the witness, should never have been admitted, but having been admitted, it should be treated as absolutely no proof at all because having no probative worth whatever. The pages of the record on which those statements are printed might as well be blank pages, for the statements themselves are so utterly worthless that they cannot be considered in passing on the demurrer to the evidence.

Bearing in mind the rule to the effect that the statements must be **spontaneous** and that the burden of proving spontaneity rests upon the plaintiff who offers proof of such statements, let us see whether such statements were, under the evidence, spontaneous, or whether they were merely a guess about what might have happened.

Did plaintiff bear the burden of showing that they were spontaneous utterances by a person who was present when the accident occurred and saw for himself what happened? That is the first question of all to be settled. The evidence absolutely fails to show any fact from which the jury

could find that the man in the crowd who "looked like an I. C. switchman" was present when the accident occurred. The witness who testified that some man in the crowd stated that something sticking out from the side of the train hit Haney or that he **thought** something sticking out from the side of the train hit him, or that it was supposed to have hit him, expressly testified that **that man did not claim to have seen the accident** (Rec. pp. 40, 62). Not only did the plaintiff fail to bear the burden of showing that the unknown person was present, but he proved by his own witness that such unknown person **did not claim to have been present when the accident happened** (Rec. pp. 40, 62). That fact in itself is sufficient to exclude the testimony, for if the man was not at the scene of the accident when it occurred, there could be no such thing on his part as a spontaneous utterance which was so closely connected with the happening of the accident when it occurred, that it could be said to be a part of the res gestae. That unknown man could not have testified to what he had not seen if he could have been found and called as a witness, because such testimony would have been purely hearsay.

Again, plaintiff failed to meet the requirement of the rule regarding such evidence, because his own evidence expressly showed that the statements, if made at all, were made so long after the occurrence of the accident that the unknown man in the crowd making the statement had ample time to reflect upon what he had either seen or heard and to make up a story which may have been based upon his own conclusion from things that he saw after the accident happened, or from the statements of others, either as to what they saw or what they concluded from the facts that they learned.

The evidence of plaintiff's witness was that he was up at the station, which the evidence showed was, in the night

time, more than half a mile away from the scene of the accident, when he learned that a man had been hurt down at the Frisco switch, which was the place near which decedent was found unconscious. This witness testified that he and another witness walked through the railroad yards, a distance of over half a mile, and when they got down to where the plaintiff's decedent was lying a gang of switchmen were there (Rec. p. 59).

It does not appear how long after the accident the news got to this witness. After somebody saw the injured man upon the ground the news in some undisclosed way eventually reached Mr. Young at the station, half a mile from the scene of the accident, and he told the witness and they walked to the switch. In addition to that, it will be recalled that it was sometime after the Frisco train had passed the scene of the accident before a witness from the railroad yards went up to the switch to see why the light had not changed after the train had gone in, and he there found Haney. All the time necessary for those things to happen had elapsed before the unknown man in the crowd made his alleged statement.

Since the test of the admissibility of evidence of such statements is **spontaneity**, and since there is a total failure of proof of spontaneity by plaintiff upon whom the burden of proof on that subject rested, it necessarily follows that the evidence of such statements should have been excluded, because it was mere hearsay. The most strenuous and repeated objections were made to such evidence, but the court continually overruled all such objections.

While it is true that the length of time elapsing after the happening of the accident varies in different cases, and it need not always be shown that the statement was made at the scene of the accident, nevertheless in every case it will be found that the statement must have been made **spontaneously at the earliest possible moment after the**

accident occurred and by one who has personal knowledge of the fact. A man may have been knocked unconscious in the course of an accident. He may not have come to for three or four days, but if, as soon as he is able to talk intelligently he makes a statement as to how the accident happened, **if he saw it,** and the surrounding circumstances show that the statement is made spontaneously without any opportunity or attempt to make up a story or color the facts in any way, then the test of spontaneity is met and the evidence may properly be received.

But in this case it is not claimed that the speaker in the crowd was rendered unconscious; on the contrary, he was not even shown to have been present when the accident occurred. Of course his statement to the effect that he **thought** some object sticking out of the side of the car had hit Haney was inadmissible because it was a mere expression of opinion. No rule of law permits one to **guess** how an accident **might** have occurred simply because the guess is made shortly after the accident. A guess is nevertheless a guess even though made promptly.

Such statements do not amount to anything. A verdict cannot be based upon them. A court, because such statements were improperly admitted cannot consider them in passing upon the demurrer to the evidence. We do not have here a case (like some cases) where defendant's counsel allowed the hearsay evidence to be admitted without objection. The record reveals the most determined and persistent efforts on the part of counsel of both defendants to keep such evidence out of the record. It was repeatedly objected to as hearsay; motions were made to strike it out after it was admitted; and motions to discharge the jury on account of the bringing out of such improper testimony were made, and an instruction was requested, withdrawing it from jury's consideration, but all to no avail. The trial Judge simply could not see our point.

The question of the admissibility of this evidence is not a Federal question. It should be left to the Missouri court for determination. The Supreme Court of Missouri has held the evidence to be inadmissible under the law of that state. Its decision is final under the decision of this court in Erie v. Thompkins, 304 U. S. 64, 58 Sup. Ct. 817.

(b) Eliminating the statement made by the unknown man in the group standing around Haney while unconscious from his injury, which statement must be eliminated in view of all of the authorities above cited, what have we left in this case on which plaintiff can base a right of recovery? The theory of the third amended petition on which the case was tried was that something was sticking out of or swinging from the Frisco train as it passed the point where Haney was standing after he had thrown the switch on the occasion in question, and struck him.

We shall demonstrate under another heading that even if plaintiff had offered evidence tending to show that some object sticking out of or swinging from the train actually killed Haney, the appellant, Illinois Central Railroad Company, could not be held liable for Haney's death on that account.

But it is important first to consider whether there was any evidence tending to show that some such object either sticking out of or swinging from the train caused Haney's death.

Not only does the evidence show that it was a physical impossibility for the mail catcher arm, 80 inches above the ground where Haney could have stood on the level of the ties to have struck him, but the authorities which we shall presently cite, and many others which could be cited, make it perfectly clear that where the most that can be said in favor of a plaintiff's case is that the injury could have resulted from a cause for which defendant was liable,

or that it could have resulted from a cause for which the defendant was not liable, and where the evidence leaves the matter entirely to speculation or guesswork to determine which cause did produce the injury, the plaintiff has wholly failed to make a case and it is the duty of the trial court to sustain a demurrer to the evidence. If the trial court has overruled the demurrer under such circumstances, it is the duty of the appellate court to reverse the judgment outright, as was done by the Supreme Court of Missouri.

Aside from the statement of the unknown man in the group above referred to (which is to be disregarded as hearsay), plaintiff's evidence at most merely tends to show that Haney was standing some distance away from the switch track when the train passed, or after it passed. **The undisputed evidence, offered by plaintiff, showed that Haney had been struck on the back of the head to the right of the middle line and his skull had been fractured at that point.**

There is no theory which the evidence tends to support which would justify a finding that something from the train struck or could strike Haney in the back of the head or on the right side of his head.

If, as is virtually certain, an assailant quietly slipped up behind him with a drawn pistol or with a piece of pipe and struck him a violent blow upon the back of his head, it could easily have fractured his skull in the back part of his head and would certainly have caused him to fall forward and land just where he was found unconscious a short time later. Tough characters frequented that place constantly (Rec. p. 24).

Plaintiff's witness, Dr. Turner, testified the wound could have been caused by a gaspipe or club or similar round object in the hands of some individual (Rec. p. 66).

Even if it could be said that it was just as probable that

or swinging out from the side of the train struck Haney, and plaintiff's own evidence showed positively that such a thing did not and could not happen.

Physical facts are far more trustworthy than the memory of a witness. The sympathies of a witness for one side or his prejudices against the other side in a law suit may cause him intentionally to misstate facts; and the frailty of the human mind, which is well known to all courts, may cause a witness to misstate facts unintentionally. But where physical facts are shown by the plaintiff in a damage suit and where they are so clearly shown as to reveal beyond any chance of error or mistake that an accident could not have happened as claimed by plaintiff, then all courts recognize the rule that the physical facts prevail and evidence given with the intent to contradict them or inferences sought to be drawn which are contrary to them are worthless and should be wholly disregarded by the courts.

Let us give attention to some of the physical facts which the plaintiff himself proved by his own witness Bundy. It will be recalled that Bruso first discovered the unconscious form of Haney and hurried back into the yards, directed an employee to call an ambulance and taking plaintiff's witness Bundy with him returned to the point where he had found Haney and where he was still lying unconscious.

The petitioner tries very hard to distort the testimony of his witness Bundy by saying that Bundy testified to facts which showed that Haney was lying parallel to the Frisco switch track with his head pointed in the direction in which the train was moving when it passed the switch. The testimony of Bundy cannot be fairly construed as bearing out that statement; on the contrary, it proves exactly the opposite state of facts, showing clearly that Haney's head was pointing almost directly South towards

the switch track while his feet were straight back North of him. We find on pages 26 and 27 of the record as printed for this court, the following testimony given by Bundy, "He was north of the switch and a little to the west of it; probably two or three feet west. His head was pointed south, kind of on an angle. The Frisco track runs east and west at that point. Haney's head was pointed a little south and east and his feet extended northward, kind of on an angle. I would say Haney's head was about six feet from the switch, that is north of it, and a little to the west. I think Haney was about 5 feet 10 inches in height. (Note, Haney's son, who knew his father's height, testified [Rec. p. 81], 'My father was about 5 feet 7½ inches tall.') I would say his feet were about 10 feet North of the North rail of the Frisco track and extended straight back of him, not doubled under him."

From the testimony of plaintiff's own witness, Bundy, showing that Haney was lying with his feet 10 feet North of the Frisco switch track and his head towards the south, the fact is established that Haney was standing at least 10 feet North of the North rail of that switch track when something struck him (Rec. p. 27).

To repeat, allowing even 2 feet from the overhang of the side of the mail car to the North of the North rail of the track, that would leave the distance between the north side of that mail car and the place where Haney was standing at least 8 feet. Even if he was elevated 2 feet above the level of the ties, standing on the cinders and gravel (which evidence shows but 18 to 20 inches high [Rec. p. 66]), Haney would be so far North from the side of the passing car that it would have been impossible for the mail catcher arm to have touched any part of his anatomy, even if a man on the inside of the car had opened the door and pulled the lever controlling the motion of the mail catcher arm downward and inward so as to swing

the mail catcher arm out to the very limit to which it could be extended it could not have been swung out more than 36 inches. That is proved by the testimony of plaintiff's own witness Farmer (Rec. pp. 83, 84). Without being pulled up by aid of that handle the mail catcher arm cannot swing out more than 12 inches, as Farmer testified (Rec. p. 84). Therefore, even if the mail catcher arm had been swung out 36 inches from the side of the car it would have lacked the difference between 36 inches and 8 feet (which difference is 5 feet) of swinging out far enough north to touch Haney. It could not have knocked him down no matter how he was lying when found. If, therefore, Haney was standing on the cinders and gravel he was in a perfectly safe place so far as danger of being struck by the mail catcher arm was concerned.

If Haney was standing on the level ground between the north rail of the Frisco switch track and the cinders and gravel it would have been absolutely impossible for the mail catcher arm to have struck him, whether it swung out 12 inches as it could do under some circumstances without the use of the lever, or whether it was operated by means of the lever. This is because, as Farmer, plaintiff's own witness, testified emphatically the lower end of the mail catcher arm when down by the side of the car is 80 inches above the ties (Rec. pp. 83 and 84). **This is not disputed.**

The four photographs reproduced in the record as printed under the supervision of the Clerk of this court on pages 102a, 102b, 102c and 102d, are reproductions of the pictures which were set forth in the original record opposite page 120. Those in the record printed especially for this court are not as clear as those which were printed in the original record filed with the petition for a writ of certiorari and printed opposite page 120 thereof as above stated, but they are clear enough fully to support

our contention. From those photographs it appears very plainly that the ground between the north rail of the Frisco track and the cinders and gravel, about 10 feet north thereof, is not only level, but is on a level with the ties of that track. That fact appears indisputably from the photograph, Defendant's Exhibit B, on page 102B of the new record and opposite page 120 of the record filed in this court. It also appears very plainly that the switch stand near which Haney was standing when injured was standing on ties which were on a level with the ties of the track. Although both Mrs. Haney and her son, Alvin, were recalled to the witness stand (Rec. pp. 136-137) after all the photographs and other exhibits had been admitted in evidence, and both of said witnesses had been over the scene of accident, neither of them denied the correctness of these photographs. It, therefore, appears that Haney, if standing between the switch track and the cinders and gravel, was standing with his feet on a level with the ties. It will be remembered that Farmer gave the distance from the bottom of the mail catcher arm when at rest to the top of the ties as 80 inches, which is, of course, 6 feet 8 inches. If Haney stood in that space the top of his head was 5 feet 7½ inches (a total of 67½ inches) above the level of the ties, while the mail catcher arm when at rest extended down to a point 80 inches above the level of the ties, and could not come lower than that; so that if Haney was standing in that space the top of his head was 12½ inches lower than the mail catcher arm when it was at rest, and when it was raised, as shown in defendant's Exhibit D on page 102 of the record, it was 9 feet above the level of the ties, which would be 108 inches. (See Farmer's evidence, Rec. p. 83.) Of course, if it was 9 feet, or 108, inches above the level of the ties, that would be 40½ inches or 3⅓ feet higher than Haney's head. This, of course, is repetition of what has been said before, but it will bear repetition because conclusive.

Under no circumstances, therefore, could Haney have been struck by the mail catcher arm, and petitioner has abandoned all contentions of anything else protruding or swinging from the side of the train.

On the subject of the value of physical facts over mere opinions or recollections of witnesses see:

Kelly v. Jones, 290 Ill. 375;
The People v. Bentley, 357 Ill. 82;
Dunn v. Alton R. Co., 104 S. W. (2d) 311;
Alexander v. St. L. San. F. R. Co., 289 Mo. 599.

Facts necessary to recovery may not be inferred from proven facts in the face of positive, and otherwise uncontradicted testimony of unimpeached witnesses which consistently with facts proved shows the facts sought to be inferred do not exist.

Penn. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391;
George v. Mo. Pac. R., 213 Mo. App. 668;
Southern Ry. Co. v. Walters, 284 U. S. 190.

This makes the plaintiff's case far more clearly one without any foundation than even the class of cases referred to where either of two causes might have produced the injury, but the evidence failed to point clearly to the true cause. This reason for holding that petitioner could not recover is even stronger than the one assigned by the Supreme Court of Missouri. Surely this is not a case where the court can wash its hands of responsibility to pass on the question of liability **upon the record** and say the question was one for the jury. There was nothing for the jury to pass on. A jury may not be permitted to say that the **impossible** has happened. Nor may a jury be permitted to return a verdict against even a railroad company on a mere **guess** that an accident **might** have happened in a certain way.

(c) The Illinois Central Railroad Company, even if held to be the employer of Haney, could not be held liable in this case, even if his fatal injury was caused by some object sticking out of the Frisco train or swinging from it, because it had no notice, actual or constructive, of the alleged defect.

If the evidence had showed (as it did not) that some object protruding from the train or swinging from it fatally injured Haney, there certainly was no evidence anywhere in the entire record tending in the least degree to show actual or constructive notice on the part of the defendant, Illinois Central Railroad Company, of the presence of such object on the side of the train or swinging from it.

A defendant is not required to use his imagination to study up things that he can conceive might possibly happen, disregarding entirely ordinary human experience and his own experience.

Ward v. Ely-Walker D. G. Bldg. Co., 248 Mo. 348;
Urie v. Thompson, Tr., 176 S. W. (2d) 471;
Brewing Assn. v. Talbot, 141 Mo. 674;
State ex rel. v. Ellison, 271 Mo. 463;
Nelson v. C. Heinz Stove Co., 8 S. W. (2d) 918;
Brady v. So. Ry. Co., 320 U. S. 476, 64 S. C. 232;
A. T. & S. F. R. v. Calhoun, 213 U. S. 1.

The train in question was not a freight train, but a vestibuled passenger train (Rec. p. 58); there was no reason even to imagine that a freight car door would be swinging out or that an object would be protruding too far from the side of a flat car, for there were no flat cars or box cars or refrigerator cars in the train, it being a fast passenger train; **and it was not this respondent's train.**

(d) We must not lose sight of the fact that the train from which plaintiff claimed some unknown object was protruding or swinging was not being operated by the Illinois Central, but by the Trustees of the Frisco, which is an entirely different railroad corporation. Therefore, the Illinois Central Railroad Company had neither the duty nor the power to inspect that Frisco train, and could not, by any possibility have discovered, up to the very moment when it passed Haney, that it had an object protruding or swinging from it, if there was any such object.

Bailey v. Stix, Baer & Fuller D. G. Co., 149 Mo. App. 656;
Poe v. I. C. R. R. Co., 73 S. W. (2d) 779;
Hoover v. Baldwin, 111 S. W. (2d) 1011;
Kelley v. Railroad, 105 Mo. App. 365;
Creighton v. Mo. Pac. Ry. Co., 66 S. W. (2d) 980;
Sharp v. Cleaning etc. Co., 300 S. W. 559;
Krampe v. Brewing Co., 59 Mo. App. 277;
Wojtylak v. Coal Co., 188 Mo. 260;
Powell v. Elec. Co., 195 Mo. App. 156;
C. & N. W. Ry. Co. v. Payne, 8 Fed. (2d) 332;
Hicks v. Mo. Pac. R. Co., 40 S. W. (2d) 512.

There is no evidence in the record tending to show that the respondent, Illinois Central Railroad Company, had any actual knowledge of an object either protruding from or swinging from the Frisco train on the occasion in question. Where is there any evidence in the record tending to show that the defendant, Illinois Central Railroad Company, ought to have had such knowledge—in other words, that it had constructive notice? There is no such evidence. How could the Illinois Central Railroad Company know, as the train of another railroad came backing towards its station in the nighttime on such railroad's track over a public street which was unlighted, that there was an object either protruding or swinging

from the side of the train? There was certainly no duty on the part of the Illinois Central Railroad Company to inspect the train of the Frisco Railroad. It was beyond its power to do so, and, therefore, there could be no breach of duty in that respect.

Besides all this, we have proof made by plaintiff's own witness, Drashman, that the Frisco train was inspected at the station shortly after it arrived there and before it had been moved and **that there was no object sticking out of it or swinging from it.** There were no freight cars in the train; as above stated, the doors were vestibule doors, all of which opened inward on the passenger cars (Rec. p. 58), and the doors on the express cars and mail car were sliding doors which could be operated only from the inside of the train and could, in no event, swing out, and the mail catcher arm on the mail car was shown by plaintiff's own witness to have been so situated and equipped that it could not have swung out more than one foot under any circumstances (Rec. pp. 83-84) unless an employee inside of the mail car opened the door and by means of a lever inside of the car deliberately raised the mail catcher arm, and, even then, it could not have hurt anybody standing beside the track, for, to repeat again, at the lowest point it was eighty inches above the ground, when raised it was nine feet above the ground and extended out only thirty-six inches (Haney was only 5 feet 7½ inches tall [Rec. p. 81]), and there was no place anywhere near the scene of the accident where there would be occasion to use the mail catcher arm to take a mail pouch off of a stand provided for that purpose, and Haney's head was six feet from the track after he fell forward (Rec. p. 26) toward the track, so he had been standing at least 11 feet 6½ inches from the track (R. pp. 26-27, 93).

But even if plaintiff had made proof of something sticking or swinging out from the train and killing Haney, his

case would have been wholly wanting in the necessary element of notice to this appellant, even if it was the employer of Haney, of the existence of any object protruding from the train or swinging from it, and, therefore, plaintiff's case would have been wholly insufficient because of utter lack of such proof.

Because of failure to prove notice to defendant, Illinois Central Railroad Company, its demurrer to the evidence should have been sustained.

(c) It is axiomatic that a **defendant cannot be held for damages resulting from negligence unless some duty which rested upon the defendant has been breached.**

In cases of master and servant, it is a well-recognized rule that, while a master owes to his servant the duty to exercise ordinary care to furnish him reasonably safe appliances and a reasonably safe place in which to work, the master is not liable on account of injuries resulting to his servant by the use of appliances not furnished by the master or by reason of dangers incident to a place which is not furnished by the master as a place in which to work and over which the master has no control, so that if it is dangerous he has no power or authority to change it.

The duty to furnish a safe place to work does not require the master to furnish the servant with a place free from defects over which the master has no control.

This rule is recognized throughout this country.

Troth v. Norcross, 111 Mo. 630;
Andrus v. Bradley-Alderson Co., 117 Mo. App. 322;
Loehring v. Westlake Cons. Co. & Roebling Const. Co., 118 Mo. App. 163;
Powell v. Walker, 195 Mo. App. 150;
Spurling v. LaCrosse Lbr. Co., 204 Mo. App. 29;
Pecher v. Howd, 273 S. W. 752.

Applying the rule in the foregoing cases to the facts in this case, we find that deceased was required by his employer (whoever that employer was, plaintiff claiming it was Illinois Central Railroad Company; but his own proof showing that it was The Yazoo & Mississippi Valley Railroad Company) to go in the night time to throw a switch so as to permit a Frisco train to back into Grand Central Station in Memphis. Plaintiff's own evidence, however, revealed the fact that the switch which the deceased threw was a part of the equipment of the Frisco Railroad and the place where the deceased was standing when fatally injured was not on the Illinois Central property, and the defendant showed it was **in a public street of the City of Memphis** (Rec. p. 107). Therefore, this respondent had no right or authority either to clean up the street and remove the cinders and gravel upon which deceased was standing when injured, or to put up additional lights in said public street. Since there can be no right of recovery for negligence in the absence of the violation of a duty, as where the place to work is beyond the control of the master, it is certain that Illinois Central Railroad Company, even if it could be held to be the employer of Haney, could not properly be held liable to his administrator for damages growing out of his death.

(f) The presence of the cinders and gravel was not the proximate cause of Haney's death. As has been shown, he was perfectly safe there.

"Causa proxima non remota spectatur."

Harper v. St. L. Merch. Bridge Term. Ry. Co., 187 Mo. 575;

Brady v. So. Ry. Co., 64 Fed. (2d) 239, 320 U. S. 476;

Wecker v. Grafeman-McIntosh Ice Cream Co., 31 S. W. (2d) 974, l. c. 977;

Warner v. Ry., 178 Mo. 134;
Henry v. First Nat'l Bk., 115 S. W. (2d) 121;
State ex rel. Trading Post v. Shain, 116 S. W. (2d) 99.

(g) The Illinois Central Railroad Company, as was clearly and conclusively shown by plaintiff's own evidence, was not the employer of Haney.

We have carefully set forth in our statement of facts in this brief the evidence bearing on the subject of Haney's employment, and instead of repeating it here we respectfully refer the Court to that portion of our statement.

Pay checks for several months preceding Haney's death were identified by his widow and offered in evidence by her counsel. She testified that the endorsements on all except the last two of them were in Haney's own handwriting and that he got the money represented by the checks. As to the last two, one of them having been issued to him but not cashed before his death, and the other having been issued after his death, the endorsement on the back of each of those checks shows that by special arrangement The Yazoo & Mississippi Valley Railroad Company permitted Mrs. Haney to cash those two checks. Both the front and the back of the last check given, which covers the period from December 15, 1939, up to the date of Haney's death, have been reproduced by photostat and a copy will be found on page 90 of the Record.

Mrs. Haney's evidence shows that all of the other checks were precisely like the one of which a copy is reproduced in the abstract except for dates and amounts. Therefore, its was unnecessary to encumber the record with more than one copy, though they were all offered by plaintiff.

Plaintiff's counsel was able to confuse the jury about these checks because the diamond-shaped emblem of the Illinois Central System (a trade name for an association of separately operated railroads) appears printed in two

places upon them; the word "countersigned" appears upon the checks and part of that word is above the emblem and the name "Illinois Central" at the bottom of the checks. But the word "countersigned" evidently refers, not to the emblem and the printed name, but to the name of the person who countersigned the check and whose name was C. E. Lyon.

It is not at all uncommon for an association of railroads to use a certain design on all their advertising matter and on their checks as well. For instance, we are all familiar with the banner that appears as the emblem of the Wabash, the keystone of the Pennsylvania, the triange of the Alton, the red seal of the Missouri Pacific and the emblems used by other railroads, all of which refer to an association of which an individual railroad is a part. The undisputed evidence shows that the Illinois Central System is merely an unincorporated association made up of three separate and distinct railroad corporations, one of which is The Yazoo & Mississippi Valley Railroad Company. Each is a separate and distinct corporation. There is no legal entity of which the three are parts. It appears plainly on the face of the check in large letters at the top thereof that the check is that of The Yazoo & Mississippi Valley Railroad Company. The check is drawn on the treasurer of **that** company. The mere fact that a printed emblem with the name "Illinois Central" appears in two places on the check is wholly immaterial. Nowhere on the check does the corporate name of this appellant (Illinois Central Railroad Company) appear. Even if it had appeared from the evidence (which it did not) that The Yazoo & Mississippi Valley Railroad Company was a wholly owned subsidiary of the Illinois Central Railroad Company, nevertheless the entity of The Yazoo & Mississippi Valley Railroad Company would have remained wholly distinct from that of the Illinois Central Railroad Company, and the suit could not have been maintained against the Illinois Central

Railroad Company for the negligence of The Yazoo & Mississippi Valley Railroad Company. One corporation may not be held for the negligence of another.

Plaintiff's attempts, through oral testimony of Mrs. Haney and her son and daughter, to show that Haney wore a button with the name of the Illinois Central Railroad Company on it and that he had a pass issued by that company were not sufficient to establish the fact of his employment by The Illinois Central Railroad Company, as distinguished from The Yazoo & Mississippi Valley Railroad Company. The evidence of these three witnesses was so vague and contradictory that it proved nothing.

Then we have the testimony of the witness Bruso, who identified a button of the Brotherhood of Railroad Trainmen, a picture of which (Ex. 2) is found in the record on page 110-A, and the type of annual pass (Ex. 1), which is reproduced by photostat on page 100-A of the record. Although Mrs. Haney and her son were called as witnesses in rebuttal, neither of them testified in rebuttal that the button and the pass which Bruso had identified were different from those which Haney carried.

In addition to all that, Haney's superior, Mr. Burns (Rec. pp. 132-135), the trainmaster for The Yazoo & Mississippi Valley Railroad Company, whose duty it was to employ switchmen and switch tenders, testified positively that he was employed by The Yazoo & Mississippi Valley Railroad Company alone, and that he knew of his own knowledge that Haney, who was under him, was employed by that railroad company alone. There is no competent evidence to dispute this.

The testimony of Mr. Young, now in the employ of the U. S. Government but formerly superintendent of terminals for the Frisco, explained very clearly the relationship of the three railroads making up the Illinois Central System, and told how the bills were made out each month by the Yazoo & Mississippi Valley Railroad Company for

the services rendered by Haney as a switch tender and how the Illinois Central Railroad Company was billed by the Yazoo & Mississippi Valley Railroad Company for such two-twelfths, which the evidence showed the Frisco paid the Illinois Central Railroad Company. Thus it clearly appears that the Illinois Central did not pay the two-twelfths, but the Frisco. The Illinois Central was merely a convenient collecting intermediary.

But even if Haney had been in the employ of the Illinois Central Railroad Company, when he was loaned to the Frisco Railroad Company, or hired to it, to perform certain duties, then when he engaged in those duties he was the servant of the Frisco Railroad Company and not the servant of the Illinois Central Railroad Company.

A very excellent and learned discussion of just such situation is found in an opinion by Chief Justice Taft in the case of Linstead v. Chesapeake & Ohio Ry. Co., 276 U. S. 28, which held that an engine crew which was regularly employed by the Big Four Railroad Company but was turned over to the Chesapeake & Ohio Railway Company to do certain switching at a certain point, was, while doing such switching, in the employ of the Chesapeake & Ohio Railway Company, and when one of the men was injured he could not maintain a suit for damages under the Federal Employers' Liability Act against the Big Four Railroad Company, for which most of his services were rendered.

Other authorities support the same proposition. See:

Denton v. Y. & M. V. R. Co. et al., 284 U. S. 305, 52 S. Ct. 141, and cases therein cited.

There is no doubt whatever that the action in the case at bar is under the Federal Employers' Liability Act. That act alone fixes the rights of employees who are injured or killed while engaged in interstate commerce.

Plaintiff alleged that Haney and the defendant railroads were engaged in interstate commerce, and proved that fact. Therefore, since said Act is the only one under which recovery by a servant of a railroad can be had when doing such work as Haney was doing, and since the only persons who are entitled to the benefit of that Act are servants of railroads, it follows that Haney's representative cannot recover against the Illinois Central Railroad Company unless Haney was the servant of that railroad company at the time of his fatal injury. The evidence just reviewed showed that he did not bear that relationship to the Illinois Central Railroad Company. Therefore, there can be no recovery by his personal representative in this case against the Illinois Central Railroad Company.

The outstanding distinction between facts in the cases relied on by petitioner and the facts in this case is that in those cases **there was no question at all but that the operation of a train injured or killed the servant in question.** At least, there was ample evidence in every one of such cases clearly justifying submission to the jury of the issue of injury or death resulting from the operation of a train by defendant or its lessee; while in the case at bar the evidence clearly shows that the decedent was not killed by the operation of a train operated by defendant or its lessee, nor was there any substantial evidence from which a jury could properly have found that he was so killed, rather than by a cause for which this respondent was in no wise liable. The plain fact is that deceased met his death when assaulted and robbed by an unknown assailant.

CONCLUSION.

While the Supreme Court of Missouri assigned but one reason for holding that the plaintiff failed to make out a case entitling him to have it submitted to the jury, there

were various other reasons above discussed on account of which, we respectfully submit, this court could properly hold that the Supreme Court of Missouri did right in reversing the judgment outright on account of failure of plaintiff to produce sufficient substantial evidence to warrant submission of the case to the jury.

We briefly summarize here our reasons for the above statement:

(a) As held by the Missouri Supreme Court the verdict rests purely upon speculation and guesswork as to what cause produced the death of Haney. The decision of the Missouri court is not properly subject to review by this court no matter what may be thought to be the province of a jury. There was no competent evidence for the jury to consider.

(b) Even if the accident happened as claimed by plaintiff, such accident was so unusual that it could not reasonably be foreseen by a reasonably prudent person exercising ordinary care.

(c) Even if it was negligence on the part of the Frisco Railroad Trustees to operate its train so that a mail catcher arm might swing out one foot, this defendant could not be liable, because there was no evidence tending to show that it had notice of such condition. (Parenthetically we may add that if the mail catcher arm swung out one foot and struck Haney, more than a foot below it, there is no fact from which it could be reasonably inferred that it did so because of negligence on the part of the Frisco Trustees.)

(d) Plaintiff's evidence wholly failed to reveal that the accident happened on Illinois Central property or on property over which it had any right to exercise control, and therefore, it could not be liable for failure to furnish light

at said place or to remove the cinders and gravel north of the Frisco track.

The undisputed evidence showed that the point of accident was on a public street in the City of Memphis.

(e) No causal connection was shown between the presence of the cinders and gravel and the happening of the accident. He was safe there.

(f) The undisputed evidence—documentary evidence—offered by the plaintiff showed that Haney was an employee of the Yazoo & Mississippi Valley Railroad Company, not of the Illinois Central Railroad Co., and this was corroborated by undisputed evidence offered by this respondent.

(g) Frisco train No. 106 was not operated by the respondent.

It is, therefore, respectfully urged that the judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 550.—October Term, 1945.

Walter A. Lavender, Administrator *de bonis non* of the Estate of L. E. Haney, Deceased, Petitioner,
vs.
J. M. Kurn, et al., Trustees of St. Louis-San Francisco Railway Company, Debtor, and Illinois Central Railroad Company.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

[March 25, 1946.]

Mr. Justice Murphy delivered the opinion of the Court.

The Federal Employers' Liability Act permits recovery for personal injuries to an employee of a railroad engaged in interstate commerce if such injuries result "in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U. S. C. § 51.

Petitioner, the administrator of the estate of L. E. Haney, brought this suit under the Act against the respondent trustees of the St. Louis-San Francisco Railway Company (Frisco) and the respondent Illinois Central Railroad Company. It was charged that Haney, while employed as a switch tender by the respondents in the switchyard of the Grand Central Station in Memphis, Tennessee, was killed as a result of respondents' negligence. Following a trial in the Circuit Court of the City of St. Louis, Missouri, the jury returned a verdict in favor of petitioner and awarded damages in the amount of $20,000. Judgment was entered accordingly. On appeal, however, the Supreme Court of Missouri reversed the judgment, holding that there was no substantial evidence of negligence to support the submission of the case to the jury. 189 S. W. 2d 254. We granted certiorari to review the propriety of the Supreme Court's action under the circumstances of this case.

It was admitted that Haney was employed by the Illinois Central, or a subsidiary corporation thereof, as a switch-tender in the railroad yards near the Grand Central Station, which was owned by the Illinois Central. His duties included the throwing of switches for the Illinois Central as well as for the Frisco and other railroads using that station. For these services, the trustees of Frisco paid the Illinois Central two-twelfths of Haney's wages; they also paid two-twelfths of the wages of two other switch tenders who worked at the same switches. In addition, the trustees paid Illinois Central $1.87½ for each passenger car switched into Grand Central Station, which included all the cars in the Frisco train being switched into the station at the time Haney was killed.

The Illinois Central tracks run north and south directly past and into the Grand Central Station. About 2700 feet south of the station the Frisco tracks cross at right angles to the Illinois Central tracks. A west-bound Frisco train wishing to use the station must stop some 250 feet or more west of this crossing and back into the station over a switch line curving east and north. The events in issue center about the switch several feet north of the main Frisco tracks at the point where the switch line branches off. This switch controls the tracks at this point.

It was very dark on the evening of December 21, 1939. At about 7:30 p.m. a west-bound interstate Frisco passenger train stopped on the Frisco main line, its rear some 20 or 30 feet west of the switch. Haney, in the performance of his duties, threw or opened the switch to permit the train to back into the station. The respondents claimed that Haney was then required to cross to the south side of the track before the train passed the switch and the conductor of the train testified that he saw Haney so cross. But there was also evidence that Haney's duties required him to wait at the switch north of the track until the train had cleared, close the switch, return to his shanty near the crossing and change the signals from red to green to permit trains on the Illinois Central tracks to use the crossing. The Frisco train cleared the switch, backing at the rate of 8 or 10 miles per hour. But the switch remained open and the signals still were red. Upon investigation Haney was found north of the track near the switch lying face down on the ground, unconscious. An ambulance was called, but he was dead upon arrival at the hospital.

Haney had been struck in the back of the head, causing a fractured skull from which he died. There were no known eyewitnesses to the fatal blow. Although it is not clear there is evidence that his body was extended north and south, the head to the south. Apparently he had fallen forward to the south, his face was bruised on the left side from hitting the ground and there were marks indicating that his feet had dragged a few inches southward as he fell. His head was about [illegible] feet north of the Frisco tracks. Estimates ranged from 2 feet to 14 feet as to how far west of the switch he lay.

The injury to Haney's head was [illegible] by a gash about two inches long from which blood flowed. [illegible] Haney's white cap had a corresponding [illegible] about an inch and a half long and an inch wide, running at an angle downward to the right of the center of the back of the head. A spot of blood was later found at a point [illegible] conclusion following an [illegible] fractured by some [illegible] the examining doctors testified [illegible] been attached to a train [illegible] hour. But he also said that the [illegible] resulted from a blow from [illegible] object in the hands of an assailant.

Kurn's theory is that Haney [illegible]

inches above the highest parts of the mound. Haney was 67½ inches tall. If he had been standing on the mound about a foot from the side of the mail car he could have been hit by the end of the mail hook, the exact point of contact depending upon the height of the mound at the particular point. His wound was about 4 inches below the top of his head, or 63½ inches above the point where he stood on the mound — well within the possible range of the mail hook end.

Respondents' theory is that Haney was murdered. They point to the estimates that the mound was 10 to 15 feet north of the rail, making it impossible for the mail hook end to reach a point of contact with Haney's head. Photographs were placed in the record to support the claim that the ground was level north of the rail for at least 10 feet. Moreover, it appears that the area immediately surrounding the switch was quite dark. Witnesses stated that it was so dark that it was impossible to see a 3-inch pipe 25 feet away. It also appears that many hoboes and tramps frequented the area at night in order to get rides on freight trains. Haney carried a pistol to protect himself. This pistol was found loose under his body by those who came to his rescue. It was testified, however, that the pistol had apparently slipped out of his pocket or scabbard as he fell. Haney's clothes were not disarranged and there was no evidence of a struggle or fight. No rods, pipes or weapons of any kind, except Haney's own pistol, were found near the scene. Moreover, his gold watch and diamond ring were still on him after he was struck. Six days later his unsoiled billfold was found on a high board fence about a block from the place where Haney was struck and near the point where he had been placed in an ambulance. It contained his social security card and other effects, but no money. His wife testified that he "never carried much money, not very much more than $10." Such were the facts in relation to respondents' theory of murder.

Finally, one of the Frisco foremen testified that he arrived at the scene shortly after Haney was found injured. He later examined the fireman's side of the train very carefully and found nothing sticking out or in disorder. In explaining why he examined this side of the train so carefully he stated that while he was at the scene of the accident "someone said they thought that train No. 106 backing into Grand Central Station is what struck

this man" and that Haney "was supposed to have been struck by something protruding on the side of the train." The foreman testified that these statements were made by an unknown Illinois Central switchman standing near the fallen body of Haney. The foreman admitted that the switchman "didn't see the accident." This testimony was admitted by the trial court over the strenuous objections of respondents' counsel that it was mere hearsay falling outside the *res gestae* rule.

The jury was instructed that Frisco's trustees were liable if it was found that they negligently permitted a rod or other object to extend out from the side of the train as it backed past Haney and that Haney was killed as the direct result of such negligence, if any. The jury was further told that Illinois Central was liable if it was found that the company negligently maintained an unsafe and dangerous place for Haney to work, in that the ground was high and uneven and the light insufficient and inadequate, and that Haney was injured and killed as a direct result of the said place being unsafe and dangerous. This latter instruction as to Illinois Central did not require the jury to find that Haney was killed by something protruding from the train.

The Supreme Court, in upsetting the jury's verdict against both the Frisco trustees and the Illinois Central, admitted that "It could be inferred from the facts that Haney could have been struck by the mail hook knob *if* he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches." But it held that "all reasonable men would agree that it would be mere speculation and conjecture to say that Haney was struck by the mail hook", and that "plaintiff failed to make a submissible case on that question." It also ruled that there "was no substantial evidence that the uneven ground and insufficient light were causes or contributing causes of the death of Haney." Finally, the Supreme Court held that the testimony of the foreman as to the statement made to him by the unknown switchmen was inadmissible under the *res gestae* rule since the switchman spoke from what he had heard rather than from his own knowledge.

We hold, however, that there was sufficient evidence of negligence on the part of both the Frisco trustee and the Illinois Central to justify the submission of the case to the jury and to require appellate courts to abide by the verdict rendered by the jury.

The evidence we have already detailed demonstrates that there was evidence from which it might be inferred that the end of the mail hook struck Haney in the back of the head, an inference that the Supreme Court admitted could be drawn. That inference is not rendered unreasonable by the fact that Haney apparently fell forward toward the main Frisco track so that his head was 5½ feet north of the rail. He may well have been struck and then wandered in a daze to the point where he fell forward. The testimony as to blood marks some distance away from his head lends credence to that possibility, indicating that he did not fall immediately upon being hit. When that is added to the evidence most favorable to the petitioner as to the height and swing-out of the hook, the height and location of the mound and the nature of Haney's duties, the inference that Haney was killed by the hook cannot be said to be unsupported by probative facts or to be so unreasonable as to warrant taking the case from the jury.

It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's [illegible] function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and prefer a conclusion opposite from the one reached by the jury. See *Jacobs v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67-68; *Bailey v. Central Vermont R. R. Co.*, 319 U. S. 350, 353-354; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35; Sneed, Modern Trends in Judicial Interpretation in Railroad Cases Under Federal Employers' Liability Act," 29 Marquette L. Rev. 53.

It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there

a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

We are unable, therefore, to sanction a reversal of the jury's verdict against Frisco's trustees. Nor can we approve any disturbance in the verdict as to Illinois Central. The evidence was uncontradicted that it was very dark at the place where Haney was working and the surrounding ground was high and uneven. The evidence also showed that this area was entirely within the domination and control of Illinois Central despite the fact that the area was technically located in a public street of the City of Memphis. It was not unreasonable to conclude that these conditions constituted an unsafe and dangerous working place and that such conditions contributed in part to Haney's death, assuming that it resulted primarily from the mail hook striking his head.

In view of the foregoing disposition of the case, it is unnecessary to decide whether the allegedly hearsay testimony was admissible under the *res gestae* rule. Rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge in actions under the Federal Employers' Liability Act. But inasmuch as there is adequate support in the record for the jury's verdict apart from the hearsay testimony, we need not determine whether that discretion was abused in this instance.

The judgment of the Supreme Court of Missouri is reversed and the case is remanded for whatever further proceedings may be necessary not inconsistent with this opinion.

Reversed.

The CHIEF JUSTICE and Mr. Justice FRANKFURTER concur in the result.

Mr. Justice REED dissents.

Mr. Justice JACKSON took no part in the consideration or decision of this case.